

M.U. and FEDERATION REPORTS.**CHONG KWEE HIAN v. PUBLIC PROSECUTOR.**[App. Cr. Juris. (Laville, J.) June 5, 1948]
[J.B.—Cr. App. No. 6 of 1948]*Criminal Procedure Code, s. 261—Penal Code, s. 170—Part heard case—Transfer of Magistrate—Recommencement of case—Discretion of succeeding Magistrate.*

This case was originally called before the District Judge, Mr. Hepworth, and part heard, the evidence of the two complainants and two police witnesses being recorded. It was adjourned for further hearing, but in the interval Mr. Hepworth was transferred and his duties taken over by Mr. W. B. Sutherland. The case was resumed and the prosecution stated they were prepared to continue their case from the point at which it had been postponed or to recommence the whole case. Counsel for the accused was prepared to continue from where the case had been left by Mr. Hepworth. The learned District Judge ruled under s. 261 of the Criminal Procedure Code to recommence the case.

One of the points taken up on appeal was that the District Judge wrongly decided to recommence the case in view of defence counsel's preference for continuing.

In weighing the evidence for the defence the learned District Judge gave no reason for rejecting it save that he disbelieved accused and his witness.

Held. (a) that wherever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding has complete discretion to recommence the inquiry or trial or not, subject to provisos (a) and (b) to s. 261 of the Criminal Procedure Code, and it is always very highly desirable that judgment should be given in any case by a Magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses; (b) that it is merely incumbent on an accused to put up an explanation of his actions which is consistent with innocence, and the duty of the Court is, if satisfied that such is the case, to consider if it might reasonably be true, and, if so, how it effects the prosecution story.

MAGISTRATE'S CRIMINAL APPEAL.*P. V. Charry* for the Appellant.*W. M. McCall* for the Public Prosecutor.

Laville, J. :—This is an appeal by Chong Kwee Hian who was charged with impersonating a police officer and under colour of that office fraudulently inducing two cigarette vendors, Chia Ming Choo (f) and Koh Siew Wah (f), to pay him \$2.50 cash, a packet of cigarettes and a box of matches in the first case and \$3 in the second, on 30.7.47 at about 2.30 p.m. at the Johore Bahru market, contrary to the provisions of section 170 of the Penal Code.

On these charges he was convicted and sentenced to 3 months R.I. on each charge, the sentences to run consecutively.

The case was originally called before the District Judge, Mr. Hepworth on 19th October, 1947, and part heard, the evidence of the two complainants and two police witnesses recorded. It was adjourned for further hearing, but in the interval Mr. Hepworth was transferred and his duties taken over by the present District Judge, Mr. W. B. Sutherland.

The case was resumed on 21.12.47 and the prosecution stated they were prepared to continue their case from the point at which it had been postponed or to recommence the whole case. Mr. Charry, counsel for accused, was prepared to continue from where the case had been left by Mr. Hepworth.

Mr. Sutherland ruled under section 261 Criminal Procedure Code to recommence the case.

This was the first point taken up on appeal. It was argued that the District Judge wrongly decided to recommence the case in view of Mr. Charry's preference for continuing. Section 261, however, gives the Court in my opinion complete discretion in the matter and it is always very highly desirable that judgment should be given in any case by a Magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses. Section 261 (a) and (b) provide for cases in which the Magistrate elects to continue the case from the point at which it was left off by the previous Magistrate, but no provision appears to have been made suggesting that it is proper for a Magistrate in cases where the prosecution evidence would be favourable to the defence in certain circumstances to continue the case from where the previous Magistrate has left it. This seeming omission is curable, however, in that on the case being recommenced it is always open to the defence to put in evidence the record of the previous hearing with a view to showing that the prosecution witnesses are telling a new story incompatible with the previous evidence.

The next point taken by the defence is that the prosecution witnesses at the second hearing gave evidence on material points at variance with the evidence on the same points at the first hearing. To support this point a certified copy of the evidence given at the first hearing was attached to the grounds of appeal. This copy could not be accepted by the Court as having any bearing on the appeal. In the lower Court in cross-examination of the prosecution witnesses at the second hearing certain answers given by the prosecution witnesses at the first hearing were put to them and denied by them and the matter was left there. The actual record of the evidence at the

first hearing was not put in evidence by the defence in rebuttal of the denials and it must be assumed that the denials were accepted by the defence. Yet on appeal it was sought to put in the record of the first hearing in support of the appellant's case that owing to the different statements by the prosecution witnesses on the same points at the two hearings their evidence could and should not be believed. This amounted to the production of fresh evidence at the appeal and was objected to by the Deputy Public Prosecutor whose objection I upheld.

The case for the prosecution rests on two grounds:—

(1) the corroboration given by each of the two complainants to each other and their general reliability as witnesses and (2) the validity of their identification of the accused at a parade held on the late evening of 30th July, 1947, at the police station. The learned trial Judge states that he believed the complainants' evidence as to identification and as to what happened in the market, but gives no reason for his belief beyond saying that they were unshaken in cross-examination. He had of course the advantage of seeing the witnesses and listening to their evidence.

The appellant attacks this finding on grounds based mostly on alleged discrepancies between the prosecution evidence at a previous and the present hearing. These discrepancies cannot be examined further for the reason I have stated above.

The other grounds taken are firstly that the evidence of Gano Hamid which, if true, throws doubt on part of the story told by complainant Koh Siew Wah was ignored by the District Judge and that it tends to impugn the credibility of her evidence. There is no doubt that it is at variance with her evidence.

The second ground is that the police story of the information and arrest of the accused is not beyond suspicion. In regard to this it seems clear that the investigation started on information verbally given by both complainants to Det. Sgt. Theng Ah Kow whom they met about 4 p.m. on their way home, but the nature of the information is not disclosed; it resulted in the arrest of accused at 4.50 p.m. by the Det. Sgt. based presumably on a description. The complainants were then sent for to the police station where accused already was and a report taken from each, and the investigation taken over by Inspector Karthigesu. He ordered and carried out an identification parade at which both complainants identified accused.

It would, I think, have been preferable if Det. Sgt. Theng Ah Kow had, as soon as he received infor-

mation from these women, sent them at once to the police station to report, but no doubt he wished to satisfy himself that there were some grounds for their story whatever it then was, but these circumstances do not in my opinion cast any doubt on the genuineness of the investigation and arrest. It would not be possible to delay an arrest in a seizable case simply because a formal report had not been yet made.

There is however some ground for thinking that not enough care was taken in regard to the identification parade. There is the evidence of Koh Siew Wah that the accused was dressed differently from the others on this parade, and though it would appear he was given the option of changing he did not do so. As the same parade was used for the other complainant a similar state of things existed there. Inspector Karthigesu says he does not remember how accused was dressed, but most of the parade were wearing similar clothes to him.

The District Judge has stated that he did not believe the *alibi* put up by the accused. The offence charged took place about 2.30 p.m. Koh Siew Wah gives the time as 2.30 to 3 p.m., Chia Ming Choo as some time after 2 p.m. It would appear that Chia Ming Choo was approached first.

Accused's story is that he arrived at the bus stand, Jalan Segget, about 2 p.m., stayed there 2 or 3 minutes only and then went to his mother's house. He is supported in this by witness Yong Siong who came with him in the taxi from Bukit Panjang and went with him to his mother's house and says it was at most 5 minutes they stopped at the bus stand. The District Judge appears to have overlooked the evidence of this witness, who also states he was with the accused there till 3.30 p.m. Accused's mother, Lee Nyuk Lan, supports her son's and Yong Siong's story as to arrival of both about 2 p.m. and departure of the latter at 3.30 p.m. The presence of the accused in his mother's house is also vouched for by his brother between 3 p.m. and 3.30 p.m.

The learned District Judge in weighing this evidence gives no reason for rejecting it save that he disbelieved accused and Yong Siong and thought the times given by the other two defence witnesses were approximate. But this criticism can also apply to the times given by the complainants in this case. There is no doubt that if the defence story is true, the prosecution story is based on a wrong identification.

The question for the learned District Judge was which of two incompatible stories he should accept.

Great weight should be attached to the fact that he saw and heard the witnesses, but it is clear that the identification parade was not as free from doubt as it should have been and that possibly the clothing of the accused on that occasion persuaded the complainants that accused was the man to be pointed out.

As against this there are two witnesses for the defence who definitely place accused in a position during the crucial times where he could not have been the guilty person. These witnesses were not in any way shaken in cross-examination.

The *onus* of proof placed on the accused in a criminal case is far less than that required from the prosecution; it is merely incumbent on him to put up an explanation of his actions which is consistent with innocence, and the duty of the Court is, if satisfied that such is the case, to consider if it *might* reasonably be true, and, if so, how it affects the prosecution story. Viewed in that light I am of opinion that there can be no doubt that the accused's story, backed by witnesses there is no reason to disbelieve, might reasonably be true. If that is so, it follows that the prosecution story cannot be accepted and the benefit of the doubt must be given to the accused and the issue be decided in his favour.

Accordingly the conviction in both cases must be set aside and the sentence quashed and the accused acquitted on both charges, and I so order.

*Conviction Set Aside
Accused Acquitted.*

CHIN HON & 2 ORS. v. PUBLIC PROSECUTOR.

[C. A. (Pretheroe, Ag. C.J., M.U.; Murray-Aynsley, C.J. (Singapore) and Evans, J.) June 12, 1948]

[K.L. — Cr. App. No. 132 of 1947]

Penal Code, s. 34 — Common intention.

To invoke the aid of s. 34 of the Penal Code successfully it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone.

Cases referred to:*—

- (1) *Fazoo Khan & Ors. v. Jatoo Khan & anor.*, A.I.R. (1931) Cal. 643.
- (2) *Mahbub Shah v. Emperor*, A.I.R. (1945) P.C. 118.

COURT OF APPEAL (CRIMINAL).

F. J. Woodward for the 1st Appellant.

* Reference may also be made to *Rex v. Banka* (1936) M.L.J. 66. Ed. M.L.J.

P. J. D. Regester for 2nd Appellant.

T. K. Sen for the 3rd Appellant.

J. V. M. Shield for Respondent.

The judgment of the Court of Appeal was delivered by :—

Pretheroe, Ag. C. J. :— At the conclusion of this appeal the Court announced that each of the appeals was dismissed and that the Court would state in writing its reasons in so far as one of the grounds of appeal was concerned. That ground which was submitted by Mr. Woodward, and adopted by counsel for the other two appellants, read as follows :—

The learned trial Judge should have directed the Assessors that they should arrive at a finding of fact as to which of the three accused took what part if any in furtherance of the common intention to commit the offence with which they are jointly charged before the Court could record a conviction against the first accused or any of the accused for the offence with which they are jointly charged read with section 34 of the Penal Code (Cap. 45). The learned trial Judge did not give this direction and no such finding was made by the Assessors. The conviction is therefore bad in law.

This submission was based on the following comment by *Ratanlal* at page 72 of the 16th edition of his *Law of Crimes* :—

Before any accused can be convicted of an offence read with this section (i.e. section 34) the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such a finding is illegal.

It is clear that this comment cannot mean precisely what it says, for at pages 64 and 65 of the same volume the following comment appears :—

This section (i.e. section 34) is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, and protection to the person actually committing the act.

The first of the two comments quoted above was based on the head-note to *Fazoo Khan & Others v. Jatoo Khan & another*⁽¹⁾, which reads as follows :—

Penal Code section 34. Participation in action to commit offence with common intention is essential element and Court must arrive at finding as to part played by each individual accused in furtherance of common intention.....a conviction without such finding is illegal.

There is nothing in the judgment in that case to support that part of the head-note which requires a Court to arrive at a finding as to the part played by each individual accused. The correct position is made clear by the decision of the Privy Council in *Mahbub Shah v. Emperor*⁽²⁾. The relevant portion of the